



December 10, 2015

VIA FOIAONLINE.REGULATIONS.GOV  
U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: 316(b) Biological Opinion RPAs

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

#### REQUESTED RECORDS

The Center requests the following records that are required as terms and conditions for non-discretionary reasonable and prudent measures (“RPMs”) of the Programmatic Biological Opinion (“BiOp”) on the U.S. Environmental Protection Agency’s (“EPA”) Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (“CWA”), that are maintained, possessed, controlled, and/or generated by EPA:

1. From RPM 2: all annual reports summarizing the facility monitoring data submitted by State Directors to EPA pursuant to 125.98(k), including data on impacts to species listed as threatened or endangered under the Endangered Species Act, 7 U.S.C. §§ 1531-1544 (“ESA”), or to critical habitat, any additional summary reports to the Director, and any raw data.
2. From RPM 3: all annual and/or semi-annual reports by EPA prepared in order to review the effectiveness of the technical assistance process between the Directors and the U.S. Fish and Wildlife Service and/or Regional Office of the National Marine Fisheries Service (“Services”).
3. From RPM 4: all instructional memoranda that EPA prepared for State Directors and developed in coordination with the Services detailing the technical assistance process that is to occur between the Services and the Directors.
4. From RPM 5: all lists of facilities that are currently operating under administratively continued permits and may be subject to the Rule.

5. From RPM 8: all notifications by EPA informing Directors and/or the Services if an owner/operator locates dead or injured federally-listed species, including the date, time, location, and possible cause of injury or mortality (e.g. impingement or entrapment) of each species.

This request is limited to those records, described above, that were not previously provided to the Center under FOIA. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not in the original record.

The Center is willing to receive responsive records on a rolling basis.

### FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily-accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Please provide all records in a readily-accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “profiles” or “embedded files.” Profiles and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

### REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The fee waiver amendments of 1986 were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees.

Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests," which are "consistently associated with requests from journalists, scholars, and *non-profit public interest groups*." *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ... ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

#### I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's regulations at 40 C.F.R. § 2.107(1)(2) and (3) establish the same standard.

Thus, EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns "the operations or activities of the Federal government," (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) whether the disclosure "will contribute to public understanding" of a reasonably-broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(1)(2). As shown below, the Center meets each of these factors.

##### A. The Subject of This Request Concerns "The Operations and Activities of the Government."

The subject matter of this request concerns the operations and activities of EPA. This request asks for records that are required as terms and conditions for non-discretionary RPMs of the Programmatic BiOp on EPA's Issuance and Implementation of the Final Regulations Section 316(b) of the CWA, that are maintained, possessed, controlled, and/or generated by EPA.

Release of the requested records will assist the public in understanding EPA's responsibilities and obligations to protect imperiled fish and other aquatic wildlife. Protection of imperiled fish and wildlife under the ESA, as well as implementation and execution of laws like the CWA are specific and identifiable activities of the government, in this case the EPA; thus, the Center meets this factor. *See Judicial Watch*, 326 F.3d at 1313 ("reasonable specificity" is "all that FOIA requires" with regard to this factor) (internal quotations omitted).

##### B. Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Cooling water entrainment and impingement is estimated to kill billions to tens-of-billions of aquatic animals every year. Section 316(b) of the CWA provides the primary mechanism for addressing impacts to aquatic wildlife, and the ESA prohibitions on take of endangered species is an important backstop to ensure that endangered aquatic animals and plants are not harmed by cooling water intake facilities. The information requested will help provide the Center with crucial insight into implementation of the new 316(b) process to protect endangered species, and whether the EPA, State agencies, and/or the Services are complying with the process as intended.

These records are the only way that the public can assess the amount of harm that is occurring to aquatic species from large power plants and other facilities, and assess how the federal government is addressing these harms. Once the information is made available, the Center will analyze it and present it to its 900,000 members and online activists and the general public in a manner that will meaningfully enhance the public's understanding of implementation of the new 316(b) process to protect endangered species, and whether the EPA, State agencies, and/or the Services are complying with the process as intended.

Thus, the requested records are likely to contribute to an understanding of EPA operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably-Broad Audience of Interested Persons' Understanding of the new 316(b) Process to Protect Endangered Species, and Whether EPA, State Agencies, and/or the Services are Complying with the Process as Intended.

The requested records will contribute to public understanding of the new 316(b) process to protect endangered species, and whether EPA, State agencies, and/or the Services are complying with the process as intended, consistent with the ESA.

Protecting threatened and endangered species generally, and specifically using the new 316(b) process to protect endangered fish and aquatic species, are areas of interest to a reasonably-broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about potential impacts to endangered and/or threatened species, how EPA evaluates threats to endangered species from large power plants and other facilities, whether EPA's actions are consistent with the legal requirements of the ESA, CWA, and other laws, and whether EPA's decisions and activities have been appropriate or whether certain actions should be undertaken to correct EPA's actions. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) ("... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.").

Through the Center's synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994)

(applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the impacts of large power plants and other facilities on threatened and/or endangered species, that are not currently in the public domain. *See Cnty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested documents “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”<sup>1</sup>

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the impacts of large power plants and other facilities on threatened and/or endangered species. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about the impacts of large power plants and other facilities on endangered species, and the importance of ensuring that EPA’s actions are fully protective of these species.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of the new 316(b) process to protect endangered species, and whether EPA, State agencies, and/or the Services are complying with the process as intended are consistent with the ESA, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about EPA’s compliance with national environmental and natural resource laws, like the ESA. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

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<sup>1</sup> In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

## II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over twenty-five years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decisionmaking, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,000 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. Many media outlets have reported on the new 316(b) technical-assistance process and endangered fish and aquatic species protection, utilizing information obtained by the Center from federal agencies including OSMRE. Last year, more than 1.5 million people visited the Center's extensive website, viewing a total of more than 5.7 million pages. The Center sends out more than 350 email newsletters and action alerts per year to more than 900,000 members and supporters. Three times a year, the Center sends printed newsletters to more than 50,000 members. More than 87,000 people have "liked" the Center on Facebook, and there are regular postings regarding protection of endangered fish and aquatic species. The Center also regularly tweets to more than 37,000 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 900,000 members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee-waiver. We hope that EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (971) 717-6409 or [foia@biologicaldiversity.org](mailto:foia@biologicaldiversity.org). All records and any related correspondence should be sent to my attention at the address below. If I am unavailable, contact Amy Atwood at (971) 717-6401 or [atwood@biologicaldiversity.org](mailto:atwood@biologicaldiversity.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend", with a stylized flourish at the end.

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